IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

VIRGINIA WILLIAMS — PLAINTIFF

VS. — CIVIL ACTION NO. 3:99CV062-B-A

UNIVERSITY MEDICAL CENTER
FEDERAL CREDIT UNION — DEFENDANT

MEMORANDUM OPINION

This matter is before the court on motion of the defendant for summary judgment. In accordance with the provisions of 28 U.S.C. § 636(c), both parties consented to have a United States magistrate judge conduct all proceedings in this case, including an order for entry of a final judgment. Therefore, the undersigned has authority to decide this motion for summary judgment. Because the plaintiff has failed to show that the defendant's proffered explanation for its actions was false, the court finds that the defendant's motion is well taken and should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Virginia Williams worked as manager for the University Medical Center Federal Credit Union ("UMFCU") for approximately six years. UMFCU hired Williams at age sixty-two in July of 1992 and terminated her at age sixty-nine in September of 1998. Williams alleges that she was fired because of her age in violation of 29 U.S.C. § 621 et seq., the Age Discrimination in Employment Act ("ADEA"). The ADEA provides that "it shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

Not surprisingly, the defendant argues that age had nothing whatever to do with Williams' termination. In support of this contention, UMFCU points to numerous problems with Williams' work product over the years. In particular, a 1997 evaluation submitted as evidence provided that Williams had "difficulty solving out of balance situations." That same evaluation stated that Williams "frequently requires assistance in performing familiar routine duties that had been performed in the past without problem."

In April of 1998 Dennis Perry, the manager of UMFCU, sent a memorandum to Ms.

Williams directing that she change certain procedures she was using. UMFCU also submitted three letters, two from co-workers[1] written in July of 1998, and one from a customer, written in June of 1998, sharply criticizing the work of Ms. Williams. After describing at length the difficulties she had with Ms. Williams, the customer wrote in the letter that she meant no disrespect to Ms. Williams, "but because of situations like this, I have advised friends against opening an account or have advised them to do as I plan to do in the future – only make transactions with Ms. Killen."[2] The customer also stated that while she had nothing personal against Ms. Williams, she usually tried to time her visits to UMFCU during Ms. Williams' lunch or other break time. She did this, she said, because "[v]ery rarely has Ms. Williams waited on me that she has not had to contact the Jackson branch for assistance with any matter other than the simplest transaction."

Finally, in August 1998, Jerry Barber, President of the UMFCU Board of Directors, sent a letter to Ms. Williams notifying her that she had been placed on probation. The letter detailed the problem areas in which UMFCU believed Ms. Williams needed to improve,[3] and gave Ms. Williams forty-five days to demonstrate that she had the necessary skills and ability to discharge

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[1]One co-worker wrote a three page letter criticizing Ms. Williams' ability. The co-worker eventually summarized her letter, stating, "I watched her work and her transactions showed me that she didn't know what she was doing." The second co-worker went into detail explaining the mistakes Ms. Williams was making and the consequent results.

[2]After terminating Ms. Williams, UMFCU replaced her with Becky Killen.

[3]The letter listed the following areas as in need of improvement:

1. Ability to perform all computer transactions necessary for the basic operation of the office.
2. Demonstrate managerial ability to run office, deal with customer requests in a friendly and efficient manner. Be knowledgeable of all services offered by the Credit Union and how to implement them.
3. Ability to follow office procedures, loan procedures, etc.
4. Ability to sell money orders, travel checks and to understand the balancing and remitting of these transactions.
5. Ability to balance cash.
6. Ability to keep Credit Union financial, staff and membership information confidential.
7. Ability to coordinate all schedules of leave time and follow all correct procedures for leave.

her duties at an acceptable level, and informed her that she could also schedule a meeting with the UMFCU Board of Directors concerning the matter if she wished. In her deposition, Ms. Williams stated that she saw no reason to meet with the Board. Indeed, Ms. Williams did not speak to anyone on the Board about the letter or her probation. She stated only that as a result of the letter, she tried to slow down and pay attention. At the end of the forty five days, on September 28, 1998 UMFCU terminated Ms. Williams for failing to respond to her performance probation.

II. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *cert. denied*, 484 U.S. 1066 (1988)). After a proper motion for summary judgment is made, the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Beck*, 204 F.3d at 633; *Allen v. Rapides Parish School Bd.*, 204 F.3d 619, 621 (5th Cir. 2000); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.3d 455, 458 (5th Cir. 1998). Substantive law determines what is material. *Anderson*, 477 U.S. at 249. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*, at 248. If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. *Celotex*, 477 U.S. at 327. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is

no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538 (1986); *Federal Savings and Loan, Inc. v. Krajl*, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. *Allen*, 204 F.3d at 621; *PYCA Industries, Inc. v. Harrison County Waste Water Management Dist.*, 177 F.3d 351, 161 (5th Cir. 1999); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *see Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." *Little*, 37 F.3d at 1075 (emphasis omitted).

B. AGE DISCRIMINATION

Title VII prohibits an employer from failing or refusing to hire or discharge an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The ADEA proscribes similar treatment on the basis of age. 29 U.S.C. § 623(a)(1). The same evidentiary procedure for allocating burdens of production and proof applies to discrimination claims under both statutes. *See Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir. 1995) (per curiam). Initially, the plaintiff must establish a prima facie case of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish this prima facie case, the plaintiff must prove that: (1)she is a member of a protected class; (2) she was otherwise qualified for the position that he held; (3) she was discharged; and (4) after her discharge she was replaced with a person who is not a member of the protected class. *Meinecke*, 66 F.3d at 83 (citation omitted). The first three elements of a prima facie case of age discrimination under the ADEA and discrimination under Title VII are identical. *See Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). For the fourth element in an age discrimination case, the plaintiff must show that "[s]he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of [her] age." *Id.*

Establishing a prima facie case creates a presumption that the employer unlawfully

discriminated against the employee. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 525 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This presumption places on the defendant the burden of producing evidence that the challenged employment action was taken for a legitimate, nondiscriminatory reason. *See Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254. The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, "if believed by the trier of fact," would support a finding that unlawful discrimination was not the cause of the employment action. *Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254-55.

If the defendant succeeds in carrying its burden of production, the presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture, and the trier of fact proceeds to decide the ultimate question of whether the plaintiff has proved that the defendant intentionally discriminated against him. *See Hicks* 509 U.S. at 511; *Burdine*, 450 U.S. at 253. "In attempting to prove discrimination, the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000). Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Reeves*, 120 S.Ct. at 2106 (quoting *Burdine*, 450 U.S. at 255 n.10).

1. Prima Facie Case

In the present case, the court finds that the plaintiff succeeded in creating a prima facie case. The plaintiff was sixty-nine years old when she was fired and thus a member of a protected class. As far as being otherwise qualified for the position, the plaintiff held the position for six years before being fired. During that time, evaluations were done describing her work at times as

"good" and "superior." She had also worked for the University for approximately ten years prior to moving to UMFCU. It is undisputed that the plaintiff was discharged and replaced with Becky Killen, a person who is not a member of the protected class. Since the plaintiff was able to make out a prima facie case, the burden of production is then placed on the defendant.

2. *Legitimate Nondiscriminatory Reason*

UMFCU asserts that Williams was terminated for failing to respond to her performance probation as requested by the Board. The Board placed Williams on probation for the reasons discussed *supra*. In support of its reasoning, UMFCU provides letters, a memorandum from Williams' supervisor, and deposition testimony. All of the evidence produced by the defendant points to an employee having difficulty with transactions that were central to her job. Since an employer meets its burden of production in employment discrimination cases by proffering admissible evidence of an explanation that would be legally sufficient to justify a judgment for the employer, the court finds that UMFCU met its burden. Once the defendant meets its burden of production, the burden disappears, and the plaintiff's burden of persuasion arises. *Hicks*, 509 U.S. at 510. The plaintiff then may attempt to establish she was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves*, 120 S.Ct. at 2106 (quoting *Burdine*, 450 U.S. at 256). That is, the plaintiff will then attempt to show that the defendant's reasons submitted for termination are merely a pretext to hide age discrimination. *Id.*

3. Pretext

In an effort to show that the defendant's proffered reasons were a pretext for age discrimination, Williams relies on a comment made to Don Seagrove by Jerry Barber. Seagrove was the president of the Board of Directors at UMFCU for most of Williams' tenure. Barber replaced Seagrove in that capacity in 1998. After learning of problems with Williams' performance, Barber called Seagrove because he knew Seagrove to be a friend of Williams. In his deposition, Barber stated that he called Seagrove because he felt he had come up with a way to solve the problems he was having with Williams. Barber told Seagrove that he wanted

Williams to retire and return to work for UMFCU part-time in a public relations capacity. Barber stated that in this situation, "Virginia would be away from having to operate the computer, and she'd be away from having to balance the cash and do these sort of basic type things, and she could – Virginia liked to visit with people." (Barber Dep. at 20).

According to Seagrove, Barber also mentioned Williams' age. However, her age was not mentioned in relation to her being terminated:

> Q. All right. Now, Mr. Barber never said anywhere in this conversation that he wanted to fire Virginia, did he?
>
> A. No. He was wanting to make a move on her, mover her into some other position or something of that nature.
>
> Q. Right. He wanted to – this note indicated he wanted to change her position,[4] but he never said he wanted to terminate her, did he?
>
> A. No.
>
> Q. He never said he wanted to terminate her because of her age, did he?
>
> A. No, he just said to me that she was 69 to 70, that she could draw Social Security, that type of thing. He wanted to put her on a part-time status and that was it.

(Seagrove Dep. at 38-39).

Taken by itself, Barber's comment proves only that Williams was able to draw Social Security. The comment sheds no light on whether Williams' age was a factor in UMFCU's decision to terminate her. On the contrary, Barber's statement appears only to show that Barber was attempting to rectify a problem without having to diminish Williams' income to a large extent. In *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993), the defendant had been discussing precisely the same issue. The plaintiff pointed to the remark as evidence of discrimination. *Id.* The court explained that remarks made must be made in the context of terminating the plaintiff. *Id.* The *Bodenheimer* court wrote:

> Bodenheimer's contention that en employer's reference to retirement plans in a discharge situation constitutes age discrimination would produce unintended, and not to mention harsh, consequences. One district court has stated poignantly,

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[4]During the conversation between Seagrove and Barber, Seagrove took notes of the ideas discussed. Seagrove later re-wrote the notes and provided them to the defendant. Defense counsel referred to these notes throughout the deposition.

> "To assert that an employer is incapable of ever mentioning or noting an employee's age in a discharge situation would be to work the absurd result that an employer could not discuss severance packages and pension calculations with a departing employee." *Perry v. Prudential-Bache Sec.*, 738 F. Supp. 843, 853 (D.N.J. 1989).

Bodenheimer, 5 F.3d at 958, n.7. In addition to being spoken outside the context of termination, the statement presented in the present action does nothing to show that the reasons for firing Williams proffered by UMFCU were false.

In *Reeves*, for instance, the defendant argued that it terminated the plaintiff because he had failed to maintain accurate attendance records. *Reeves*, 120 S.Ct. at 2106. To show that such a reason was merely a pretext for discrimination, the plaintiff offered evidence that he had properly maintained the attendance records. *Id.* at 2107. The defendant argued that employees who arrived at work at 7:00 a.m. could not possibly reach their respective work stations by 7:00 a.m., and thus they must have been late. *Id.* However, the plaintiff had not listed them as late. *Id.* The plaintiff offered evidence to show that the time clock had not been working properly. *Id.* He showed that he simply wrote 7:00 a.m. as the arrival time when he saw the employees at their work station. *Id.*

The defendant in *Reeves* also argued that the plaintiff failed to discipline late and absent employees. *Id.* In response, the plaintiff put on evidence to show that disciplining late and absent employees was not his responsibility. *Id.* In other words, the plaintiff in *Reeves* was able to put forward evidence that addressed specifically the reasons stated by the defendant for firing him. In the present case, the plaintiff has failed to do this.

UMFCU states in its termination letter that it was terminating the plaintiff for failure to respond to her performance probation as requested by the Board. UMFCU put into evidence documents, including a memorandum and letters criticizing the work of the plaintiff. UMFCU has provided deposition testimony and documentary evidence that the plaintiff was fired based on, among other things, her inability to work with computers and to balance and remit daily transactions. The plaintiff has not submitted a single piece of evidence to show that the reasons listed by the defendant for terminating her were false. The plaintiff admits in her deposition that

she did not respond to the Board because she "saw no reason to." (Pl.'s Dep. at 112). The plaintiff offers no evidence that she was able to work with the computer or to balance and remit daily transactions. In sum, the plaintiff provided nothing in response to the defendant's reasoning.

III. CONCLUSION

While the *Reeves* decision clearly made it more difficult for a defendant sued pursuant to the ADEA to succeed on a motion for judgment as a matter of law, and thus also a motion for summary judgment, the Supreme Court went to some length to explain that there were certainly instances in which such a result was correct. The *Reeves* Court wrote:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. *See Aka v. Washington Hospital Center*, 156 F.3d at 1291-1292; . . . To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact.

Reeves, 120 S.Ct. at 2109.

In the present case, the court finds that the plaintiff has not created an issue of fact as to whether the employer's reason was untrue. Moreover, the defendant has provided abundant and uncontroverted independent evidence that no discrimination occurred. Accordingly, the court finds that the defendant's motion for summary judgment should be granted.

An order in accordance with this opinion shall issue this day.

This the _____ day of _____, 2000.

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UNITED STATES MAGISTRATE JUDGE